

No. 16058 ✓

United States
Court of Appeals
for the Ninth Circuit

SELDEN G. HOOPER,

Appellant,

VS.

C. C. HARTMAN, Rear Admiral USN, Comman-
dant, Eleventh Naval District, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Southern Division

FILED

AUG 15 - 1958

PAUL H. GIBBEN, Clerk

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

OSCAR F. IRWIN,
726 Bank of America Building,
San Diego 1, California.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney,
RICHARD A. LAVINE,
JORDAN A. DREIFUS,
Assistants United States Attorneys,
600 Federal Building,
Los Angeles 12, California. [1]*

* Page numbers appearing at bottom of page of Original Transcript of Record.

In the United States District Court, Southern
District of California, Southern Division

No. 2027-SD-C

SELDON G. HOOPER, Petitioner,
vs.

G. B. H. HALL, Rear Admiral, USN, Commandant, Eleventh Naval District, Respondent.

DISMISSAL OF PETITION

The petitioner having on May 2, 1957, filed a document entitled "In the Matter of the Petition for Writ of Prohibition by Seldon G. Hooper", and it appearing from the Exhibit attached to the petition that the petitioner is presently a retired naval officer entitled to receive retirement pay, the Court now summarily, and over its own motion finds that there is no jurisdiction in the United States District Court, Southern District of California, to grant the relief prayed for by petitioner in the above entitled document and, further, that even if the Court did have jurisdiction that the petition should be denied as no cause of action has been stated in that the military has jurisdiction to try petitioner, and petitioner has not exhausted his legal remedies before military tribunals,

Now Therefore, It Is Ordered that the relief sought in the petition for Writ of Prohibition be

and the same is hereby denied and the Petition is dismissed with leave to file an amended petition.

Dated: May 3, 1957.

/s/ JAMES M. CARTER,
United States District Judge. [11]

[Endorsed]: Filed May 3, 1957. Docketed and Entered May 7, 1957.

[Title of District Court and Cause.]

AMENDED COMPLAINT FOR WRIT OF
PROHIBITION AND FOR DECLARA-
TORY RELIEF

After leave of the above entitled court to amend his complaint, pursuant to the order of the above entitled court, entered May 3, 1957 in the above entitled matter, petitioner and plaintiff respectively amends his complaint to show as follows:

I.

For purposes of convenience, petitioner and plaintiff will hereinafter be referred to as plaintiff, and respondents and defendants will hereinafter be referred to as defendants.

II.

John Does I to V, inclusive are fictitious names of defendants, whose true names are unknown at this time to [12] plaintiff, and at such time as plaintiff learns the true names of said defendants,

plaintiff will ask leave of the above entitled court to amend this complaint by inserting such true names of defendants in the place of said fictitious names.

III.

Plaintiff is informed and believes and on that basis alleges that defendants John Does I to V, are officers and agents of the United States of America, and in such capacity are charged with the duty to prepare and pay to plaintiff retirement pay as a retired officer of the United States Navy.

IV.

That on or about April 15, 1957, plaintiff was charged by legal officers on active duty in the United States Navy with an offense against the Uniform Code of Military Justice, to wit: Articles 125, 133 and 134, and commanded to appear before a court martial to be convened at Headquarters, Eleventh Naval District, San Diego, California, pursuant to order of G. B. H. Hall, Rear Admiral, USN, Acting Commandant, Eleventh Naval District.

V.

That plaintiff has never been confined nor arrested as the result of said proceedings and therefore the remedy of habeas corpus is not available to plaintiff and he has no other remedies in any courts to correct the illegal acts hereinafter set forth.

VI.

Attached to the original petition filed by plaintiff

in this action as Exhibit "A"* was a true copy of the charge sheet and specifications convening said court martial and purporting to show jurisdiction of the United States Navy over the person of plaintiff, and plaintiff hereby refers to said Exhibit "A" of his original petition, and incorporates the same into this [13] his amended petition and complaint as though herein set forth in full.

VII.

The plaintiff has never been recalled to active duty in the United States Navy for purposes of a court martial, but pursuant to the aforesaid order reported to general headquarters of the Eleventh Naval District Court Martial, on Monday, May 6, 1957, and objected therein to the jurisdiction of said court martial over plaintiff, before any proceedings were had. That the objection of plaintiff was overruled and trial was held on the 6th and 7th of May, 1957 by the Board convened for such purposes, and on May 7th, 1957 the following verdict was returned by said Board:

That plaintiff was not guilty of specification 1, charge 1, that plaintiff was not guilty of specification 2, charge 1, that plaintiff was guilty of specification 3, charge 1, and plaintiff was guilty of charge 1. Specification 4 of charge 1 was dismissed without a finding, prior to the retirement of the Board for verdict.

* [Exhibit A set out at pages 19-23.]

That plaintiff was guilty of specification and charge 2, and guilty of charge 2, that plaintiff was guilty of specification and charge 3 and guilty of charge 3.

As a result of said findings, said Board purported to make an order and sentence that plaintiff be dismissed from the United States Navy and forfeit all retirement pay rights and privileges therein.

VIII.

The jurisdiction of this court on this cause of action is invoked under Section 1651(a) of Title 28, United States Code.

IX.

That your petitioner was formerly in the United States Navy on active duty and was retired with the rank of Rear Admiral therein on December 1, 1948, and since then your plaintiff [14] has not been ordered back to active duty and plaintiff since said date has not been subject to orders of the United States Navy or answerable thereto for his conduct.

X.

The offenses charged against plaintiff were allegedly committed in Coronado, California, as shown in Exhibit "A" heretofore referred to, and said offenses are cognizable under the Penal Code of the State of California, to wit: Section 288 (a) of the California Penal Code, and the attempt of the Commandant of the Eleventh Naval District and the authorities of the United States Navy to hold

plaintiff answerable for said alleged conduct in a court martial is a direct and improper interference with the jurisdiction of the State of California, and a refusal to apply the rules of comity as they exist between the State of California and the United States.

XI.

The Commandant of the Eleventh Naval District, plaintiff is informed and believes, claims jurisdiction of plaintiff's person, pursuant to Article 2 (4) of the Uniform Code of Military Justice, as set out in Title 50, United States Code, Section 552 (4)

XII.

That the findings and sentence of the aforesaid court martial as heretofore set out are not final until approved by reviewing authorities as required by law, and plaintiff believes that this is a proper case for a writ of prohibition to issue against said authorities and against defendants from taking any further action on said findings and sentence, for carrying the same into effect, and that if this court finds that said findings and sentence were illegal as ones returned without jurisdiction to make the same against your plaintiff, that this court in the [15] alternative should issue a writ of mandamus compelling the dismissal by defendants, without action of such findings and sentence, charges and specifications.

XIII.

That plaintiff contends and alleges that Title 50, United States Code, Section 552(4), is unconstitu-

tional and repugnant to the Constitution of the United States and beyond the scope of the authority of the Congress of the United States to pass, in that said statute, insofar as plaintiff is concerned and the offenses allegedly committed by plaintiff are concerned, is an attempt to exercise military court martial jurisdiction over one who is not actively on duty with the armed forces of the United States, and therefore said Section cannot be sustained on the constitutional power of Congress to raise and support armies, declare war or punish offenses against the law of nations, nor can the same be a valid exercise of the power granted Congress in Article I of the Constitution of the United States, to make rules for the government and regulation of the land and naval forces, since plaintiff is not a member of the naval forces subject to such authority and power of Congress, and the purported exercise of said authority by Congress pursuant to said Section claiming jurisdiction over retired military personnel, is an attempt to extend the power of Congress to pass rules and regulations for the government of the land and naval forces of the United States beyond the scope necessary and proper for the governing of the land and naval forces of the United States and the maintaining of proper discipline therein. Further, that the offenses charged and allegedly committed by your plaintiff did not arise in the land and naval forces of the United States within the meaning of the Constitution of the United States, but the alleged offenses, if true, are common law offenses commonly [16]

cognizable in the Civil Court and said offenses as heretofore stated are cognizable in the courts of the State of California and exclusive jurisdiction is vested in said Court of California.

XIV.

That if as plaintiff contends, Title 50, U. S. Code, Section 552(4) is unconstitutional as an attempt to exercise jurisdiction in your plaintiff's case over a person not subject to military and naval law, and over an offense not arising in the land and naval forces of the United States, such court martial proceedings and all matters pertaining thereto so far as plaintiff was concerned, are unconstitutional as a deprivation of plaintiff's right of jury trial on such offenses and charges as guaranteed by the Fifth and Sixth Amendments to the United States Constitution and the Constitution of the State of California, of which plaintiff is a citizen. That unless the defendants are restrained and prohibited by order of this court, plaintiff is informed and believes, they will continue to proceed upon said court martial findings and sentence until the same are final, at which time they will refuse, neglect and fail to pay to plaintiff the retirement pay from the United States Navy to which plaintiff is entitled, all of this in violation of the Constitutional rights of plaintiff as heretofore alleged.

As and For a Second Cause of Action and As Complaint For Declaratory Relief, Plaintiff Alleges:

I.

Plaintiff refers to Paragraphs I, II and III of his first cause of action and incorporates the same as though set out herein in full.

II.

The jurisdiction of this court is invoked under Title 28, Section 1331 and Section 1355, of the United States Code, and [17] relief is prayed for under Title 28, Section 2201 and 2202 of the United States Code. This action is brought to enjoin the enforcement of an order under the general court martial, Eleventh Naval District, United States Navy, San Diego, California, ordering plaintiff dismissed from the United States Navy and forfeiting all rights of his retirement pay from the United States Navy. The action arises under and involves the interpretation of Section 552(4), Title 50, of the United States Code, commonly called the Uniform Code of Military Justice Act, Section 2(4).

III.

Plaintiff was formerly a member of the United States Navy and was retired therefrom on December 1, 1948, with the rank of Rear Admiral, and with the right to draw retirement pay in excess of \$3,000.00 per year for active service faithfully rendered in the United States Navy for the period and under the conditions required by law for retirement with said pay, all of this prior to the commission of the alleged offenses for which plaintiff was tried. Defendant, G. B. H. Hall was and is a Rear Ad-

miral in the United States Navy and Acting Commandant, Eleventh Naval District, who purported under the authority of the United States Code, Section 552(4), to convene a general court martial to try plaintiff as a retired naval officer drawing regular pay, for offenses allegedly committed and set out in Exhibit "A" of the original petition filed herein by plaintiff, Exhibit "A" of which is hereby referred to and incorporated herein as though set out in full. That pursuant to said order and general court martial proceeding by the order of said Board convened by the authority of said defendant, on May 7, 1957, a verdict of guilty was found against your plaintiff and sentence was issued thereon dismissing plaintiff [18] from the United States Navy and forfeiting all right of retirement pay therein.

IV.

If said findings and sentence are finally approved as required by law, plaintiff will have forfeited in excess of \$3,000.00 per year, from the United States, for services performed prior to the date of the commission of the alleged offenses.

V.

That said court martial and said proceedings were over the objection and without the consent of your plaintiff.

VI.

The wrongful conduct of plaintiff as alleged by defendants allegedly occurred more than eight years after retirement of plaintiff from the United States

Navy, and the alleged offenses are cognizable in the courts of the State of California under Section 288(a) of the Penal Code of the State of California, and are not crimes or wrongs arising in the land or naval forces of the United States and are not affected with or by the necessity for maintenance of military discipline in the armed forces of the United States, and did not occur on a military reservation, naval ship, or other property owned by or within the jurisdiction of the United States military authorities, and since said retirement plaintiff has never been recalled to active duty by any authorities of the United States.

The activities allegedly engaged in by plaintiff are, if true, strictly offenses against the sovereignty of the State of California, the right to regulate and punish which is reserved to and reposed in the People of the State of California by the Constitution of the United States. [19]

VII.

Section 552(4) of Title 50 of United States Code, commonly referred to as Section 2(4) of the Uniform Code of Military Justice, is unconstitutional and void for the following reasons:

(A) Said act exceeds powers granted to Congress by the Constitution of the United States for the governing of the land and naval forces of the United States, or for the punishing of offenses or crimes arising therein, in that at the time of the commission of the alleged offenses, plaintiff was not

a member on active duty in the armed forces of the United States and was drawing retirement pay therefrom for services rendered prior to the commission of the alleged offenses.

(B) Such statute deprives plaintiff as a civilian citizen of all personal rights guaranteed in the Constitution of the United States.

(C) Said statute encroaches on the jurisdiction of the Federal Courts of the United States, under Article 3 of the Constitution of the United States, and encroaches on the rights and powers of the States as separate sovereignties reserved to them under the Constitution of the United States.

(D) Said section is void and beyond the scope and power of Congress to make rules for the government and regulation of the land and naval forces insofar as plaintiff is involved, in that plaintiff was not a member of the land and naval forces of the United States at the time of the commission of the aforesaid alleged offenses or at the time of the findings and sentence against plaintiff.

(E) That at the time of the commission of the alleged offenses and at the time of the trial of plaintiff, the courts of the United States and the Civil Courts of the State of California were available for hearing the facts of said alleged [20] offense, and were not closed or inoperative, or suspended, due to insurrection, rebellion or civil disorder.

(F) Said statute unlawfully delegates to the

authorities of the United States Navy and the Defense Department of the United States judicial power and unlimited discretion in determining that people not in the army or navy, or air force, or other military establishment of the United States, are members thereof for purposes of exercising court martial jurisdiction and punishment over said persons.

VIII.

The enforcement of the aforesaid order of the general court martial depriving plaintiff of all of his pay and forfeiting the same to which plaintiff is entitled by law, works an unusual hardship upon plaintiff and irreparable injury and damage for which there exists at law no adequate remedy. That the amount of forfeiture exceeds \$3,000.00 per year and that plaintiff is a male aged 52 years, with a normal life expectancy and is informed and believes and on that basis alleges that the value of the right to receive such pay per year for life is in excess of \$100,000.00, that the forfeiture purportedly and illegally assessed against the plaintiff damaged plaintiff in excess of \$100,000.00. The allowance of approval by convening authorities and reviewing authorities of said sentence and findings and the further enforcement of said sentence for dismissal from the Navy and forfeiture of pay, will in its effect and operation amount to confiscation of the property rights of plaintiff, in violation of the Constitution of the United States, as done without due process of law or without jurisdiction to do the acts complained of herein.

IX.

That a controversy exists between plaintiff and defendants on the constitutionality of Section 552(4) of Title 50 of the [21] United States Code and of the right of defendants to assert jurisdiction over plaintiff or to forfeit plaintiff's retirement pay as earned by law by plaintiff, or refuse to pay the same to plaintiff. Plaintiff alleges that it is a ministerial duty of defendants to make the payments to plaintiff under law as a retired officer of the United States Navy. Further, that a controversy exists between plaintiff and defendants, and that plaintiff asserts that even if Section 552(4) is constitutional to the extent that defendants may exercise jurisdiction over the person of petitioner for the purposes of dismissal from the United States Navy upon a conviction of charges as alleged, they may not forfeit the pay for retirement to which plaintiff is entitled and has earned by right and law for honorable service for the period required by law in the United States Navy prior to commission of the alleged offenses. That thereby upon retirement upon the conditions required by law therefor, plaintiff becomes entitled to said retirement pay for the remainder of his natural life and that said right to said pay is a vested right and property right in plaintiff, which defendants may not deprive plaintiff of under color of law and it is beyond the power of Congress, to deprive plaintiff of, irregardless of acts of plaintiff subsequent to the earnings of said retirement pay as a vested right.

X.

A delay in ascertaining and determining the rights of plaintiff will result in serious loss and damage to plaintiff and will deprive plaintiff of the retirement pay upon which he is dependent for his earnings and upon which others dependent upon plaintiff for their livelihood in turn are dependent. That the rights of plaintiff have been, are now, and will continue to be violated unless plaintiff is protected from the unlawful acts hereinbefore [22] complained of and the continuation of such unlawful acts by defendants purporting to derive authority and jurisdiction from the Uniform Code of Military Justice and rules and regulations promulgated by the President of the United States. The injuries which will inevitably flow from the performance by the defendants and others acting under authority of said acts and laws of the Uniform Code of Military Justice are and will be irreparable unless relief be granted by this Court and plaintiff has no other remedy at law or equity in this or other courts.

Wherefore, plaintiff prays relief as follows:

1. That on the first cause of action, the above entitled court issue its order to G. B. H. Hall, Rear Admiral, USN, ordering him to appear on a date and at a time to be set by the court to show cause why he should not be permanently restrained and prohibited from attempting to exercise any jurisdiction over the person of plaintiff by court martial

proceedings and why he should not order to dissolve and nullify as void any proceedings heretofore had as alleged in the first cause of action herein, and to rescind the findings and sentence of the court martial board entered therein.

2. (a) That on the second cause of action, Title 50, U. S. Code Section 552(4) be declared unconstitutional and void.

(b) That the court restrain defendants from enforcement of the order and sentence entered on the verdict of the court martial heretofore referred to, purporting to deprive and deny to plaintiff retirement pay from the United States Navy, to which he is entitled under the rank held as of the date of retirement therefrom.

(c) That pursuant to Title 28, United States Code, Sections 2282 and 2284, the above entitled court immediately notify the Chief Judge of the Ninth Circuit of the United States [23] Court of Appeals to designate two judges, at least one of whom shall be a circuit judge, to sit with the judge of the above entitled court to determine this action and proceeding under Section 2201 of Title 28 for declaratory relief, to declare unconstitutional an act of Congress.

3. That if findings be in favor of plaintiff, further relief as necessary to protect the rights of plaintiff pursuant to authority of Section 2201 of Title 28 of the United States Code.

4. For costs of suit herein.

/s/ SELDEN G. HOOPER,
Plaintiff.

HILLYER & CRAKE and
ENRIGHT, VON KALINOWSKI
& LEVITT,

/s/ By OSCAR F. IRWIN,
Attorneys for Plaintiff. [24]

Duly Verified.

[Endorsed]: Filed May 15, 1957.

EXHIBIT "A"

CHARGE SHEET

Place: Headquarters, Eleventh Naval District,
San Diego, California.

Accused: Hooper, Selden G. Service Number:
061172. Grade: Rear Admiral (Retired).

Organization and Armed Force: U. S. Navy (Re-
tired). Now living at 804 Glorietta Boulevard,
Coronado, California, within the Eleventh Naval
District.

Contribution to Family or Quarters Allowance
(MCM. 126h (2)): None. Pay per Month: Basic,
\$376.74. Sea or Foreign Duty, None. Total, \$376.74.

Record of Service

Prior Service: June 2, 1927 to December 1, 1948
(Retired).

Data As To Witnesses

Name of Witness: Braddock, Roscoe K., SN,
USNR. Address: U. S. Naval Receiving Station,

Exhibit "A"—(Continued)

Naval Station, San Diego, California. Witness for Prosecution.

Name of Witness: McDaniels, Michael A., HA, USN. Address: Hospital Corps School, Naval Hospital, San Diego, California. Witness for Prosecution.

Name of Witness: Schmidt, John Peter, PNS, USN. Address: U. S. Naval Receiving Station, Naval Station, San Diego, California. Witness for Prosecution.

Name of Witness: Sykes, Paul. Address: 128 "I" Street, Coronado, California. Witness for Prosecution.

Name of Witness: Strolin, H. R. Address: Office of Naval Intelligence, San Diego, California. Witness for Prosecution.

* * * * *

Charge I: Violation of the Uniform Code of Military Justice, Article 125.

Specification 1: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, on or about 20 October 1956, commit sodomy with John Peter Schmidt, personnelman third class, U. S. Navy.

Specification 2: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, during the period beginning on or about 1 November 1956 to

Exhibit "A"—(Continued)

on or about 1 March 1957, exact dates to the relator unknown, commit sodomy with John Peter Schmidt, personnelman third class, U. S. Navy.

Specification 3: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, on or about 8 March 1957, commit sodomy with John Peter Schmidt, personnelman third class, U. S. Navy.

Specification 4: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, during the summer of 1956, exact date to the relator unknown, commit sodomy with Roscoe Kurtz Braddock, seaman, U. S. Navy.

Specification 5: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California in the summer of 1955, exact date to the relator unknown, commit sodomy with Michael Alvin McDaniels, hospital apprentice, U. S. Navy.

Charge II: Violation of the Uniform Code of Military Justice, Article 133.

Specification 1: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, in a garage apartment, at the rear of 604 Glorietta Boulevard, Coronado, California, in the summer of 1955, exact date to the relator unknown, entertain at a party male guests, including Roscoe Kurtz Braddock, now seaman, U. S. Navy, Michael Alvin McDaniels, now

Exhibit "A"—(Continued)

hospital apprentice, U. S. Navy, Paul Sykes, a civilian, and Arthur Gooding, a civilian, at which party "strip poker" was played until he, the said Hooper, and the guests were nude, after which he, the said Hooper, and the said Braddock, McDaniels, Sykes and Gooding engaged in acts of sodomy while still nude, to the disgrace of the armed forces.

Specification 2: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at Coronado, California, on or about 4 March 1957, publicly associate with persons known to be sexual deviates, to the disgrace of the armed forces.

Charge III: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, on or about 3 March 1957, wrongfully commit an indecent, lewd and lascivious act with Roscoe Kurtz Braddock, seaman, U. S. Navy, by embracing the nude body of said Braddock, while he, the said Hooper, was also nude.

Signature of Accuser: Robert A. Dusch.

Typed Name and Grade: Robert A. Dusch, CDR,
U. S. Navy. Organization: U. S. Navy.

Affidavit

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 12th

Exhibit "A"—(Continued)

day of April, 1957, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice, and that he either has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

/s/ G. L. CHRISTIE,
G. L. Christie,
Captain, U. S. Navy,
Assistant Chief of Staff for
Personnel.

15th April 1957

I have this date informed the accused of the charges against him (MCM, 32f(1)).

/s/ G. B. H. HALL,
Commanding,
Rear Admiral, U. S. Navy, Acting Commandant,
11th Naval District.

Headquarters, Eleventh Naval District, San Diego, California, 15 April 1957.

The sworn charges above were received at 1015 hours, this date (MCM, 33b).

/s/ G. B. H. HALL,
Rear Admiral G. B. H. Hall, USN, Acting Com-
mandant, 11th Naval District.

* * * * *

[Endorsed]: Filed May 2, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION

To the Plaintiff and His Attorneys, Hillyer and
Crake, Esq., Please Take Notice:

That the Defendant, G. B. H. Hall will bring on
for hearing the within Motion to Dismiss and for
Summary Judgment on Monday, September 9, 1957,
at 10:00 A.M., before the Honorable James M.
Carter, United States District Judge, at the United
States Courthouse, San Diego, California.

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

/s/ JORDAN A. DREIFUS,
Assistant U. S. Attorney,

Attorneys for Defendant,
G. B. H. Hall. [29]

[Endorsed]: Filed August 13, 1957.

[Title of District Court and Cause.]

MOTION TO DISMISS AND FOR
SUMMARY JUDGMENT

The Defendant, G. B. H. Hall moves the Court that this suit be dismissed under the provisions of Rule 12, Federal Rules of Civil Procedure, or in the alternative, for Summary Judgment of dismissal of this suit under the provisions of Rules 12 and 56, Federal Rules of Civil Procedure, upon each and all of the following grounds:

I.

That the Defendant, G. B. H. Hall, is not the Commandant of the Eleventh Naval District, having only been acting Commandant for a short period, C. C. Hartman, Rear Admiral, U. S. Navy, having succeeded to that office after a temporary absence, and the Plaintiff as yet not having moved to substitute C. C. Hartman in place of G. B. H. Hall as Defendant in the manner required by Rule 25(d), Federal Rules of Civil Procedure, this suit has abated as a matter of law; [30]

II.

That this Court has no jurisdiction of the subject matter of the suit.

That this suit, being one for Declaratory Judgment and injunction, necessarily raises issues concerning the jurisdiction of courts-martial and the effect of a sentence thereof which are in this suit

wholly outside the subject matter jurisdiction of this Court;

III.

That insofar as this suit involves the issue of the dismissal of an officer from the Armed Forces of the United States, it purports to review an action wholly within the power of the President and the Executive Branch of the government and wholly outside the subject matter jurisdiction of this Court;

IV.

That the Secretary of the Navy, not having been named or served as a Defendant in this suit, the Plaintiff has failed to join an indispensable party;

V.

That the Commandant of the Eleventh Naval District, having no power, authority or discretion over any of the subject matter as to which Plaintiff prays relief, this suit fails to state a claim upon which relief can be granted;

VI.

That the Plaintiff having yet failed to exhaust the remedies available to him in the court-martial appellate review procedures, this suit fails to state a claim upon which relief can be granted.

The following documents in support of this motion are submitted: [31]

Affidavit of C. C. Hartman, attached hereto as Exhibit No. 1.

Affidavit of Luis V. Castro, attached hereto as Exhibit No. 2.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

/s/ JORDAN A. DREIFUS,
Assistant U. S. Attorney,
Attorneys for Defendant,
G. B. H. Hall. [32]

EXHIBIT No. 1

AFFIDAVIT

United States of America,
Southern District of California—ss.

I, Rear Admiral C. C. Hartman, United States Navy, having been duly sworn, do state as follows:

1. I am and have been on all the dates stated in this affidavit, Commandant of the Eleventh Naval District of the United States Navy at San Diego, California, except that Rear Admiral G. B. H. Hall was Acting Commandant during my temporary absence.

2. I am and on all the dates stated in this Affidavit have continued to be authorized to convene general courts-martial under Article 22, Uniform

Exhibit No. 1—(Continued)

Code of Military Justice, and the Acting Commandant is and was likewise so authorized in my absence.

3. On April 15, 1957, there were received at my Headquarters sworn charges, against Rear Admiral Selden G. Hooper, United States Navy, Retired, alleging violations of Articles 125, 133 and 134, Uniform Code of Military Justice, a copy of which is attached hereto as Exhibit A.

4. On the same date, April 15, 1957, the Chief of Staff, Eleventh Naval District, in my absence, appointed an investigating officer to conduct a pretrial investigation under the provisions of Article 32, Uniform Code of Military Justice. The investigating officer thereafter returned his report to me including therein a recommendation that the charges against Rear Admiral Hooper be tried by general court-martial.

5. These charges were referred for trial by general court-martial by my order, endorsed thereon, dated April 24, 1957. On April 29, 1957, by my order of that date, copy of which is attached hereto as Exhibit B, I appointed a general court-martial, composed of officers of sufficient rank, as required by Article 25d, Uniform Code of Military Justice, for trial of these charges, incorporating therein the reference for trial previously made on April 24, 1957. Rear Admiral Hooper was arraigned and

Exhibit No. 1—(Continued)

tried on May 6 and 7, 1957, at San Diego, California, before that General Court-Martial. [33]

6. On May 27, 1957, the District Legal Officer of the Eleventh Naval District, submitted to me the record of trial of the General Court-Martial of Rear Admiral Hooper together with his review containing his written opinion thereon, pursuant to Article 61, Uniform Code of Military Justice. On the same date I took action on the record in writing in accordance with the recommendation of the District Legal Officer, pursuant to Articles 60, 64 and 65a, Uniform Code of Military Justice. On the same date, I directed publication of General Court-Martial Order No. 90-57, Eleventh Naval District Headquarters (publishing therein the results of trial including my action on the case), pursuant to paragraph 90, Manual for Courts-Martial, United States, 1951, a copy of which is attached hereto as Exhibit C.

7. Pursuant to Article 65a, Uniform Code of Military Justice, and paragraph 91, Manual for Courts-Martial, United States, 1951, the record of trial was on the same date transmitted by United States mail to the Office of the Judge Advocate General, United States Navy.

8. From that date to the date of this affidavit, neither said General Court-Martial case, nor the record of trial therein have been remanded to me, nor have I received from the Judge Advocate Gen-

Exhibit No. 1—(Continued)

eral, or any other superior authority any authorization or direction to take any further action of any kind with respect to that case.

/s/ C. C. HARTMAN.

Subscribed and sworn to before me this 31st day of July, 1957.

/s/ EDA D. MANDICH,

Notary Public in and for the County of San Diego,
State of California. My Commission Expires
January 27, 1959.

EXHIBIT 1-B

(Copy)

22, A17-1, Ser 273/22

Commandant
Eleventh Naval District
937 N. Harbor Drive
San Diego 30, California

29 Apr 1957

From: Commandant, Eleventh Naval District.

To: Rear Admiral Robert L. Campbell, U. S. Navy,
President, General Court-Martial, Eleventh
Naval District, U. S. Naval Station, San Diego,
California.

Sub: Appointing general court martial.

Pursuant to authority contained in Section 0102 in the 1955 Naval Supplement to the Manual for Courts-Martial, United States, 1951, a general court-martial is hereby ordered to convene at the

Exhibit 1-B—(Continued)

U. S. Naval Station, San Diego, California, at 0900 hours on 6 May 1957, or as soon thereafter as practicable for the trial of Rear Admiral Seldon G. Hooper, U. S. Navy, Retired, only, whose unarraigned case is now in the hands of the Trial Counsel of the General Court-Martial convened by my appointing order serial 198/22 dated 28 March 1957. The court will be constituted as follows:

Law Officer: Commander Benjamin J. Jacobs, U. S. Navy, certified in accordance with Article 26a. Commander Daniel Flynn, U. S. Navy, certified in accordance with Article 26a; either of whom is empowered to act as such.

Members: Rear Admiral Robert L. Campbell, U. S. Navy, Rear Admiral Walter W. Honaker, SC, U. S. Navy, Brigadier General Russell N. Jordahl, U. S. Marine Corps, Rear Admiral Frederick C. Stelter, Junior, U. S. Navy, Rear Admiral William M. Nation, U. S. Navy, Rear Admiral Ralph K. James, U. S. Navy.

Counsel: Lieutenant Commander Robert E. Conway, U. S. Naval Reserve, Trial Counsel, certified in accordance with Article 27b. Lieutenant Lawrence E. Phillips, U. S. Navy, Trial Counsel, certified in accordance with Article 27b. Lieutenant (junior grade) Sam M. Prochaska, U. S. Naval Reserve, Defense Counsel, certified in accordance with Article 27b.

EXHIBIT 1-C

DF:ac

Eleventh Naval District Headquarters

27 May 1957

General Court-Martial Order No. 90-57

Before a General Court-Martial, which convened at the U. S. Naval Station, San Diego, California, pursuant to my appointing order 22 A17-1 Serial 273/22, dated 29 April 1957, was arraigned and tried Rear Admiral Selden G. Hooper, U. S. Navy (Retired), 061172.

Charge I: Violation of the Uniform Code of Military Justice, Article 125.

Specification 1: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, on or about 20 October 1956, commit sodomy with John Peter Schmidt, personnelman third class, U. S. Navy.

Specification 2: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, during the period beginning on or about 1 December 1956 commit sodomy with John Peter Schmidt, personnelman third class, U. S. Navy.

Specification 3: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, on or about 8 March 1957, commit sodomy with John Peter Schmidt, personnelman third class, U. S. Navy.

Exhibit 1-C—(Continued)

Specification 4: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, on or about 1 September 1957, commit sodomy with Roscoe Kurtz Braddock, seaman, U. S. Navy.

Charge II: Violation of the Uniform Code of Military Justice, Article 133.

Specification: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at Coronado, California, on or about 4 March 1957, publicly associate with persons known to be sexual deviates, to the disgrace of the armed forces.

Charge III: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, on or about 3 March 1957, wrongfully commit an indecent, lewd and lascivious act with Roscoe Kurtz Braddock, seaman, U. S. Navy, by embracing the nude body of said Braddock, while he, the said Hooper, was also nude.

Pleas

To Specifications 1, 2, and 3 of Charge I: Not Guilty.

To Specification 4 of Charge I: Motion to Dismiss Granted.

Exhibit 1-C—(Continued)

To Charge I: Not Guilty.

To the Specification of Charge II and Charge II:
Not Guilty.

To the Specification of Charge III and Charge
III: Not Guilty.

Findings

Of Specifications 1 and 2 of Charge I: Not
Guilty.

Of Specification 3 of Charge I: Guilty.

Of Specification 4 of Charge I: Motion to Dis-
miss Granted.

Of Charge I: Guilty.

Of the Specification of Charge II and Charge II:
Guilty.

Of the Specification of Charge III and Charge
III: Guilty.

Sentence

To be dismissed from the service and to forfeit
all pay and allowances. (No previous convictions
considered.)

The sentence was adjudged on 7 May 1957.

Action

“Commandant’s Office
Eleventh Naval District
San Diego, California

In the foregoing case of Rear Admiral Selden
G. Hooper, U. S. Navy, Retired, the sentence is
approved.

The record of trial is forwarded to the Judge

Exhibit 1-C—(Continued)

Advocate General of the Navy for review by a Board of Review.

C. C. HARTMAN,

Rear Admiral, U. S. Navy,

Commandant, Eleventh Naval District, San Diego,
California.”

C. C. HARTMAN,

Rear Admiral, U. S. Navy,

Commandant, Eleventh Naval District, San Diego,
California.

/s/ R. L. LIBBY,

Captain, U. S. Navy,

District Legal Officer, By Direction.

[Endorsed]: Filed August 13, 1957.

[Title of District Court and Cause.]

EXHIBIT No. 3

AFFIDAVIT

Commonwealth of Virginia,
County of Arlington, to wit—ss.

This day before me, Homer A. Walkup, a legal officer of the Bureau of Naval Personnel, authorized to administer oaths and to act as a notary public by Article 136, Uniform Code of Military Justice, Title 10, U. S. Code, Section 936, personally appeared in the County and Commonwealth afore-

Exhibit No. 3—(Continued)

said, Vice Admiral J. L. Holloway, Jr., U. S. Navy, who, being duly sworn, deposes and says:

1. That he is Chief of Naval Personnel, Department of the Navy, Department of Defense, United States of America.

2. That in his capacity as Chief of Naval Personnel, he is responsible to the Secretary of the Navy for, inter alia, procurement, distribution, training, discipline, discharge, retirement, and maintenance of records, with respect to personnel of the United States Navy and the United States Naval Reserve.

3. That he maintains, in the ordinary course of official business, in his official custody, and under his official supervision, the records relating to the service and performance of Selden G. Hooper, Rear Admiral, U. S. Navy, retired, file number 61172.

4. That entries made in the ordinary course of official business in records maintained by the affiant as aforesaid, relating to the said Selden G. Hooper, indicate that the said Selden G. Hooper, from a period before 1 January 1955 up to and including the present time, has been in the status of a retired officer not on active duty, and has maintained his residence in the city of Coronado, California; that official mail addressed from the Department of the Navy to the said Hooper while he has been in the status and maintaining the residence aforesaid has been sent via the Commandant of the Eleventh Naval District, San Diego, California; and that, under date of 12 April 1957, there were preferred against the said Hooper certain charges of viola-

Exhibit No. 3—(Continued)

tions of the Uniform Code of Military Justice, upon which he was tried before a general court-martial convened by the Commandant of the Eleventh Naval District on 6 and 7 May 1957.

5. That the pay of retired naval personnel not on active duty is disbursed by the Navy Finance Center in Cleveland, Ohio, an activity maintained under the supervision of the Comptroller of the Navy and the Assistant Secretary of the Navy (Financial Management).

6. That as regards other relationships between the naval service and retired officers not on active duty, both the office held by the affiant and those of the Commandants of the Naval Districts in which such officers maintain their homes have areas of responsibility. In areas wherein the affiant deals with such officers, he ordinarily does so through the intermediacy of Naval District Commandants; in areas wherein Commandants deal with such officers, the affiant is usually informed by being furnished copies of correspondence. That examples of such dealings by the affiant with retired officers not on active duty, which examples are not all inclusive, are the following:

a. Determines, in accordance with applicable provisions of law, when the needs of the naval service require ordering retired officers to active duty, and issues or causes to be issued on behalf of the Secretary of the Navy appropriate orders to the retired officers concerned.

Exhibit No. 3—(Continued)

b. Furnishes verification of status and service to the Navy Finance Center in Cleveland, Ohio, in order that appropriate action can be taken by that office to initiate and continue retired pay to the retired officers concerned in the proper amounts.

c. Maintains or causes to be maintained at the Bureau of Naval Personnel in Washington, D. C. each retired officer's individual record of service, which record covers all of that officer's service in the Navy, including all periods of active duty, periods while in a retired status, and periods of active duty while in a retired status.

d. Considers cases wherein retired officers are convicted of commission of felony by civil authorities, and in proper cases makes recommendations to the Secretary of the Navy for his further consideration and recommendation to the President, in connection with dropping the officer concerned from the rolls.

e. Calls to the attention of the retired officer concerned complaints relative to his failure to pay just debts, failure to furnish adequate support to dependents, or other conduct tending to bring discredit upon the Navy, and determines what further action is required with respect to such alleged conduct, if any.

7. That court-martial proceedings against retired officers not on active duty represent an area wherein Naval District Commandants are responsi-

Exhibit No. 3—(Continued)

ble for initiating and conducting such proceedings through all stages prior to review by a board of review in the office of the Judge Advocate General of the Navy.

8. That the affiant notes from the style of the captioned litigation that the respondent, Rear Admiral G. B. N. Hall, U. S. Navy, has been described as the Commandant, Eleventh Naval District; that records maintained in the ordinary course of official business, in the official custody and under the official supervision of the affiant, indicate that the said Rear Admiral G. B. N. Hall is not the Commandant of the Eleventh Naval District, but is the Commander, Naval Air Bases, Eleventh and Twelfth Naval Districts, having reported to that position on 18 January 1957, pursuant to orders of the affiant under date of 31 August 1956; that official records maintained as aforesaid indicate that the Commandant of the Eleventh Naval District is Rear Admiral C. C. Hartman, U. S. Navy, who reported as Commandant on 31 January 1955, pursuant to orders of the affiant under date of 1 November 1954.

Further, the affiant saith not.

Given under my hand this 3rd day of August 1957.

/s/ JAMES L. HOLLOWAY, JR.

Taken, sworn to, and subscribed before me this 3rd day of August 1957.

/s/ HOMER A. WALKUP,

Commander, USNR, Legal Officer.

EXHIBIT No. 4

Commandant's Office
Eleventh Naval District
San Diego 30, California

Address Reply to Commandant, 11th Naval District and refer to: P19-2, ND11/010(NR)dd, Serial 340/010(NR).

12 July 1948

From: Captain Selden G. Hooper, USN, 61172.

To: The Secretary of the Navy.

Via: (1) The Commandant, Eleventh Naval District. (2) The Chief of Naval Personnel.

Subject: Voluntary retirement, request for.

1. Having completed twenty-one years commissioned service in the United States Navy on 2 June 1948, it is requested that I be transferred to the retired list of officers of the Navy, effective 1 December 1948.

2. This request for retirement is predicated, in part, upon my understanding that I am eligible to receive the retirement benefits prescribed for an officer who has been specially commended for performance of duty in active combat. If this be not so, this request is cancelled.

/s/ S. G. HOOPER,
S. G. Hooper.

[Pen Note: He is eligible.—(Illegible)]

Exhibit No. 4—(Continued)

61172

Pers-325-TRD/lib

8 December 1948

From: Secretary of the Navy.

To: Rear Admiral Selden G. Hooper, USN, Retired, 604 Glorietta Boulevard, Coronado, California.

Subj: Transfer to the Retired List.

1. Your request to be transferred to the retired list was approved by the President of the United States, effective 1 December 1948.

2. Having been specially commended by the head of the executive department for your performance of duty in actual combat, you were on 1 December 1948 transferred to the retired list with the rank of Rear Admiral but with the retired pay based on the rank of Captain in accordance with the provisions of U. S. Code, Title 34, sections 410b and 410n.

3. Please furnish the Disbursing Officer having custody of your pay record four certified copies of this letter.

4. Please acknowledge receipt to the Chief of Naval Personnel.

5. During the time you have so faithfully and efficiently served, you have witnessed many advancements in the morale, strength and efficiency of the Navy; and you have the satisfaction of knowing

Exhibit No. 4—(Continued)

that you have contributed materially to the accomplishment of these results. I regret your retirement from active service and take this occasion to extend to you my heartiest congratulations and appreciation for your long and distinguished service to our Nation. May I wish you continued success and many years of health and happiness.

M. E. ANDREWS,

Acting Secretary of the Navy.

Prepared by Commander T. B. Dabney, USN,
BuPers 325, Extension 71116.

CC: Pers-321, Pers-1B, Pers-32152, Pers-327, Pers-311, Pers-8311, Pers-8232, Pers-82231, Pers-311s4, BuS&A (Spec. Pay. Div., Cleveland, Ohio), Office copy, Jacket copy.

13 December 1948

From: Selden G. Hooper, Rear Adm. USN (ret.).

To: Chief of the Bureau of Naval Personnel.

Subject: Letter of transfer to Retired List USN,
receipt of.

Ref: (d) Secnav Ltr file No. 61172, Pers. 325-TBD/
lib, dated 8 Dec. 1948 to Selden G. Hooper.

1. In accordance with par. 4 of the ref., receipt is hereby acknowledged of the ref.

/s/ SELDEN G. HOOPER.

Exhibit No. 4—(Continued)

Rear Admiral Selden Gain Hooper, U. S. Navy,
61172, Retired

Transcript of Naval Service

25 Dec. 1904—Born in Chicago, Illinois.

6 Jul. 1923—Midshipman, U. S. Navy.

2 Jun. 1927—Ensign, U. S. Navy.

7 Aug. 1947—Commander, U. S. Navy to rank
from 22 June 1938.

19 Apr. 1945—Captain for temporary service.

1 Dec. 1948—Placed on the Retired List with the
rank of Rear Admiral.

Ships and Stations

U. S. Naval Academy, Annapolis, Md., from Jun.
1927 to Aug. 1927.

USS New Mexico (dufly) from Sep. 1927 to May
1930.

Submarine Base, New London, Conn., from Jul.
1930 to Dec. 1930.

Submarine Division Nineteen, from Feb. 1931 to
Sep. 1932.

USS Fulton, from Sep. 1932 to Mar. 1933.

USS Palos, from Apr. 1932 to Sep. 1934.

USS Canopus, from Sep. 1934 to Feb. 1935.

U. S. Naval Academy, Annapolis, Md. (Instruc-
tion), from May 1935 to May 1936.

USS Eagle (CO), from Jun. 1936 to Jun. 1936.

Exhibit No. 4—(Continued)

Third Naval District, from Jun. 1936 to May 1937.

USS Borie (Executive Officer) (CO), from Jun. 1937 to Sep. 1940.

NROTC Unit, Marquette University, Milwaukee, Wisconsin, from Oct. 1940 to Dec. 1941.

USS Richmond, from Jan. 1942 to Jun. 1943.

Bureau of Naval Personnel, from Jun. 1943 to Aug. 1943.

Naval Training Station, Naval Operating Base, Norfolk, Va., from Sep. 1943 to Oct. 1943.

USS Uhlmann (CO), from Nov. 1943 to Mar. 1945.

Destroyer Division Forty-Four, from Mar. 1945 to Jan. 1946.

Eleventh Naval District (Dir. Naval Reserve), from Feb. 1946 to Nov. 1948.

Schools attended prior to entering U. S. Naval Academy: Palo Alto High, Columbian Preparatory.

Wife: Not married.

Children: None.

Mother: Resa Hooper.

Father: Not of record.

Home address: 604 Glorietta Boulevard, Coronado 18, California.

EXHIBIT No. 5

Prep. 9/19/49.

Pers-329-RT, 061172

From: The Chief of Naval Personnel.

To: Rear Admiral Selden G. Hooper, U.S.N. (ret.),
604 Glorietta Blvd., Coronado, Calif.

Subj: Uniform; wearing of.

Ref: (a) Your letter dated 8 September 1949.

1. Permission is hereby granted you to wear your naval uniform on appropriate occasions while employed as Superintendent of the West Coast Naval Academy.

2. It is the policy of the Navy Department to permit retired and Reserve officers to wear their naval uniforms on appropriate occasions when engaged in the instruction of a cadet corps or similar organization at naval or military academies or other institutions of learning. It would be permissible, therefore, for other retired and Naval Reserve officers employed by the West Coast Naval Academy to wear their naval uniforms in connection with such duties.

[Endorsed]: Filed August 21, 1957.

EXHIBIT No. 6-A

United States of America

Department of the Army

Washington, 25 October, 1957

I Hereby Certify that the official records in the custody of The Adjutant General of the Army show that as of 30 September 1957 there were 58,453 retired personnel of the Regular Army who are entitled to receive pay.

I Further Certify that no statistics are available relative to the number of retired reserve personnel receiving hospitalization from an Armed Force.

/s/ HERBERT M. JONES,
Herbert M. Jones,
Major General, USA,
The Adjutant General.

I Hereby Certify that Major General Herbert M. Jones, who signed the foregoing certificate, is The Adjutant General of the Army, and that to his certification as such full faith and credit are and ought to be given.

In Testimony Whereof I, Wilber M. Brucker, Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed and my name to be subscribed by the Deputy Administrative Assistant of the said Department, at

Exhibit No. 6-A—(Continued)

the City of Washington, this 25th day of October, 1957.

[Seal] /s/ WILBER M. BRUCKER,
Secretary of the Army,
/s/ By JAMES E. COOK,
Deputy Administrative
Assistant. [100]

EXHIBIT No. 6-B

CERTIFICATE

This Is To Certify that the records of the Office of Personnel, United States Coast Guard Headquarters, Washington, D. C., indicate that as of 1 September 1957 there were 8019 retired persons of the regular component of the U. S. Coast Guard who were entitled to receive pay.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States Coast Guard to be affixed this 24th day of September, 1957.

[Seal] /s/ ALLEN WINBECK,
Allen Winbeck,
Rear Admiral, USCG,
Chief, Office of Personnel,
U. S. Coast Guard.

This Is To Certify that Rear Admiral Winbeck, U. S. Coast Guard, to me known to be the person

Exhibit No. 6-B—(Continued)

described in and who executed the above certificate is the Chief, Office of Personnel, U. S. Coast Guard.

/s/ KENNETH S. HARRISON,
Chief Counsel,
U. S. Coast Guard. [101]

EXHIBIT No. 6-C

Department of the Navy
Bureau of Naval Personnel
Washington 25, D. C.

In reply refer to Pers-A232-pms

October 3, 1957

From: Chief of Naval Personnel.

To: Judge Advocate General.

Subj: Certified statement regarding personnel of the Armed Forces subject to the Uniform Code of Military Justice; request for.

Ref: (a) JAG ltr JAG:142:hjs ser 107869 of 20 Sep 1957.

1. As requested in reference (a) the following information is furnished:

As of 30 June 1957

Retired	22,463 ¹	33,562
Fleet Reserve		20,871 ²

¹ Includes 76 Retired officers on Active Duty.

² Includes 234 Fleet Reservists on Active Duty.

Exhibit No. 6-C—(Continued)

2. Information concerning the number of Retired Reservists receiving hospitalization from an armed force is not available.

/s/ F. C. RYDEEN,
F. C. Rydeen,
By direction.

EXHIBIT No. 6-D

Department of the Navy
Headquarters United States Marine Corps
Washington 25, D. C.

2 October 1957

In reply refer to DGK-7-efs

To Whom It May Concern:

This is to certify that the present numerical strength of the Marine Corps in the categories of personnel specified in subsections 4 and 6 of Article 2, Uniform Code of Military Justice as of 31 July 1957, is as follows:

Subsection 4: Retired personnel of a regular component of the armed forces who are entitled to receive pay:

Officers 2960

Enlisted 6542

Subsection 6: Members of the Fleet Reserve and Fleet Marine Corps Reserve: 1782.

The numerical strength under subsection 5, Retired personnel of a reserve component who are receiving hospitalization from an armed force, is

Exhibit No. 6-D—(Continued)

not available at this Headquarters or at Bureau of Medicine and Surgery, Department of the Navy.

/s/ C. A. RIGAUD,

C. A. Rigaud,

Head, Records Branch.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Nov. 19, 1957.

EXHIBIT No. 6-E

United States of America
Department of the Air Force
Washington 25, D. C.

18 December, 1957

I Hereby Certify that I am the Deputy Chief of Military Personnel Records Division, Directorate of Administrative Services, Headquarters United States Air Force; that as such I have official and legal custody of personnel records of retired Air Force members; that the records of the Department of the Air Force show approximately 17,506 retired personnel of the regular component who are entitled to receive pay and approximately 10,176 retired personnel of a non-regular component who are entitled to receive hospitalization from an armed force.

/s/ EUGENE M. MORIARTY,

Eugene M. Moriarty,

Deputy Chief,

Directorate of Administrative
Services.

Exhibit No. 6-E—(Continued)

I hereby Certify that Eugene M. Moriarty, who signed the foregoing certificate, is the Deputy Chief of Military Personnel Records Division, Directorate of Administrative Services, and that to his certification as such, full faith and credit are and ought to be given.

In Testimony Whereof I, James H. Douglas, Secretary of the Air Force, have hereunto caused the seal of the Department of the Air Force to be affixed and my name to be subscribed by the Administrative Assistant to the Secretary of the Department, at the city of Washington, this 18th day of December, 1957.

[Seal] /s/ JAMES H. DOUGLAS,

Secretary of the Air Force,

/s/ By PHILIP J. CUNAN,

Administrative Assistant. [105]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed December 30, 1957.

[Title of District Court and Cause.]

STIPULATION AND ORDER

1. As to defendants "John Does I to V inclusive", named in the Amended Complaint on file herein, this suit shall be dismissed.

2. The motion entitled "Motion to Dismiss and for Summary Judgment" filed herein by the former

defendant G. B. H. Hall shall be deemed filed, nunc pro tunc, in behalf of defendant C. C. Hartman as of the date said motion was originally filed in behalf of said defendant Hall.

3. All memoranda, documents or other papers filed in behalf of defendant, G. B. H. Hall shall be deemed to have been filed nunc pro tunc as of the dates of their original filing in behalf of defendant, C. C. Hartman.

4. The motion of plaintiff dated August 30, 1957 brought on for hearing September 9, 1957 entitled "Motion by plaintiff to Substitute Successor in Public Office as Defendant and to Add [108] Additional Defendants," to the extent that it moved for addition of Charles Hunsicker, Jr., J. W. Hendry and Gerald V. Reynolds as additional defendants herein, shall, to that extent only, be withdrawn.

5. This Stipulation shall be received and ordered filed, and the following facts are admitted, and may be considered by the Court:

(a) The court-martial case of Rear Admiral Hooper, the plaintiff herein, was reviewed by the Board of Review, Office of the Judge Advocate General, U. S. Navy, West Coast, at San Bruno, California, and the Board of Review, after briefs and argument, announced, on September 10, 1957, its opinion and decision affirming the conviction and sentence.

(b) The court-martial case was thereafter transmitted to the United States Court of Military Appeals, Washington, D. C. for further review and is

presently docketed before that Court as United States v. Hooper, No. 11,113, in which, appellant Hooper's Opening Brief has just been filed.

Dated: This 25th day of March, 1958.

HILLYER & CRAKE and
ENRIGHT, VON KALINOWSKI
& LEVITT,

/s/ By OSCAR F. IRWIN,
Attorneys for Plaintiff.

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

/s/ JORDAN A. DREIFUS,
Assistant U. S. Attorney,
Attorneys for Defendant,
C. C. Hartman.

It Is So Ordered: This 27th day of March, 1958.

/s/ JAMES M. CARTER,
United States District Judge.

JAD:bsh [109]

[Endorsed]: Filed March 27, 1958.

[Title of District Court and Cause.]

MEMORANDUM

A motion to substitute C. C. Hartman, Rear Admiral USN, in place of G. B. H. Hall, Rear Admiral USN, has been granted.

By stipulation the parties have agreed that the motion for summary judgment heretofore made in behalf of Hall may be considered to be the motion in behalf of Hartman.

The amended complaint is entitled "Amended Complaint for Writ of Prohibition and for Declaratory Relief." It is in two counts. Count 1 invokes jurisdiction under Sec. 1651(a), Title 28 U.S.C.A. Count 2 invokes jurisdiction under Sections 1331 and 1355 and under Sections 2201 and 2202, all in 28 U.S.C.A.

Count 1

The prayer of the first cause is for an order to Hall (now Hartman) to show cause as to why "he should not be permanently restrained and prohibited from attempting to exercise any jurisdiction over the person of plaintiff by court martial proceedings, and why he should not order [110] (apparently "be ordered") to dissolve and nullify as void any proceedings heretofore had (the court martial) and to rescind the findings and sentence of the court martial board entered therein."

Thus, plaintiff in Count 1 may be seeking prohibition and/or injunction. There are no allegations in Count 1 as to plaintiff's salary or the amount in

controversy. There is no attempt to state a cause within Sec. 1331, Title 28 U.S.C.A., as a matter in controversy exceeding the sum of \$3000 and arising under the constitution, laws or treaties of the United States. No diversity of citizenship or any other jurisdictional basis for the cause is alleged, except as stated.

Hartman's motion to dismiss is granted as to Count 1.

(a) If for injunction no jurisdictional basis is alleged;

(b) If for prohibition, Sec. 1651(a) refers to writs necessary or appropriate in aid of a court's jurisdiction and agreeable to the usages and principles of law. There is alleged no matter, in respect to which this district court's jurisdiction might be aided or protected.

Count 2

Count 2 alleges plaintiff's pay to be in excess of \$3000 per year and that with his life expectancy, future pay would exceed \$100,000.00. It contends, Art. 2(4) of the Code of Military Justice, Sec. 552(4) of Title 50, U.S.C.A., is unconstitutional. The count therefore rests jurisdiction under Sec. 1331, Title 28 U.S.C.A.

Sec. 1355, Title 28 U.S.C.A., is inapplicable and adds nothing.

Sections 2201 and 2202, Title 28 U.S.C.A., only provide an additional remedy, declaratory relief, if jurisdiction otherwise exists. [111]

The bare essentials of federal jurisdiction would

appear to exist if it were not for the contents of the cause and the matters presented.

The prayer of Count 2 asks, (a) that Art. 2(4) be declared unconstitutional, (b) that the court restrain the defendants from enforcing the order and sentence of the court-martial, (c) that the court convene a three judge court and (d) further general relief under Sec. 2201, Title 28 U.S.C.A.

Although not without doubt, we think that the federal jurisdiction exists and that plaintiff has failed to state a claim for relief. That jurisdiction rests on the federal question of the constitutionality of Art. 2(4) and §3000. Defendants Motion for Summary Judgment is well taken.

(a) This is not a habeas corpus proceeding.

For this court to set itself up to review courts-martials in view of the new Code of Military Justice and the Boards of Review and the Court of Military Appeals, would certainly be improper. We do not propose to do so.

(b) Nor have we power to review dismissals from the Armed Forces of the United States.

(c) Plaintiff has failed to join the Secretary of the Navy, an indispensable party. Clearly, the court-martial [112] is now out of Hartman's hands and before the United States Court of Military Appeals. No relief granted as to Hartman can have any effect on the court-martial proceedings. Since the relief asked for is equitable in character, any order of this court would speak or expend itself as of the date of a decree and not as of the filing of the original complaint on May 2, 1957.

(d) Plaintiff has a clear set of remedies, through the Boards of Review, to the Court of Military Appeals. He is in fact now pursuing them. He has not exhausted these remedies.

Although these remedies exist by federal statute, they also include a court system. The matter is closely analagous to the rule requiring exhaustion of remedies under state statute, through the state courts.

(e) The statute under attack is over 100 years old. It has merely been recopied into the Code of Military Justice. We think it clearly constitutional. The plaintiff was a retired officer, drawing pay, entitled to wear a uniform and subject to recall to active duty. His was no distant or illusory contact with the Navy.

The Three Judge Court

Sec. 2282, Title 28 U.S.C.A., states, "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States, shall not be granted, * * * unless the application therefor is heard and determined" by a three judge court.

Sec. 2284, Title U.S.C.A., states, "In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges * * * the procedure of the court * * * shall be as follows * * *". [113]

There follows the subdivision (5) which plaintiff

contends prevents this court from dismissing or granting a summary judgment without assembling a three judge court. Obviously the restrictions in Sec. 2284(5) apply only to those cases required to be heard and determined by a three judge court. Sec. 2282 says an injunction etc., may not be granted. There is no prohibition against dismissal of summary judgment for a defendant by a single judge.

The contention of plaintiff that a statute of Congress over 100 years old, is unconstitutional, and his arguments and briefs thereon, does not necessarily raise a substantial federal question. See *Calif. Water Service Co. v. Redding* [1938] 304 U.S. 252. He has the task of convincing the single judge that a substantial question of unconstitutionality, is presented.

A single district judge, if convinced that no substantial question of constitutionality is raised, may dismiss the proceedings without the "burden, * * * expense and delay" (*Calif. Water Service case, supra*, p. 255) of applying to the Chief Judge of the Circuit to convene the three judge court. *Wicks v. So. Pacific Co.* [9 Cir. 1956] 231 F.2d 130. *Acret v. Harwood* [D.C. Co. Calif.] 41 Fed. Supp. 492, 495.

Defendant will prepare, serve and lodge findings of fact, conclusions of law and judgment, as to Count No. 2, a dismissal of Count No. 1 and in a single document within the time provided by the Rules.

Dated: March 28, 1958.

/s/ JAMES M. CARTER,

United States District Judge.

[Endorsed]: Filed March 28, 1958. Amended
April 11, 1958. [114]

United States District Court, Southern District
of California, Southern Division

No. 2027-SD-C

SELDEN G. HOOPER,

Plaintiff,

vs.

C. C. HARTMAN, Rear Admiral USN, Comman-
dant, Eleventh Naval District, Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Plaintiff, by Oscar F. Irwin, Esq., filed his Amended Complaint herein containing two Causes of Action, praying in the First Cause of Action for a Writ of prohibition and for mandatory and prohibitive injunctive relief and in the Second Cause of Action for the convening of a District Court of three judges, for injunctive relief and for a Declaratory Judgment.

Defendant, C. C. Hartman, appearing by the United States Attorney by Jordan A. Dreifus, Assistant United States Attorney filed a Motion to Dismiss and/or, in the alternative, for Summary

Judgment, and plaintiff opposed said Motion. The Court having heard the arguments of counsel and having considered the memoranda and evidence filed herein, and having heard further argument in settlement of the Form of Findings, Conclusions and Judgment, and having directed that Findings of Fact, Conclusions of Law and Judgment be [134] entered, dismissing the First Cause of Action, and granting Summary Judgment for defendant on the Second Cause of Action, the Court being duly advised in the premises, now makes and enters its Findings of Fact, Conclusions of Law and Judgment as follows:

Findings of Fact

1.

Defendant, C. C. Hartman, is Commandant of the Eleventh Naval District, United States Navy, with headquarters at San Diego, California. Defendant Hartman made his appearance in this case for himself and for no other person. Neither the Secretary of the Navy nor any other person officially superior to defendant Hartman has been joined in this suit or served with the process of the Court herein, The office of the Secretary of the Navy is in Washington, D. C.

2.

Plaintiff Selden G. Hooper graduated from the United States Naval Academy, Annapolis, Maryland, and was appointed and entered upon active duty as a commissioned officer of the regular com-

ponent of the United States Navy with the rank of Ensign, United States Navy, on June 2, 1927.

3.

Plaintiff was in the status of Commissioned Officer of the regular component of the United States Navy, in active naval service, serving on various ships and stations and being promoted from time to time, from June 2, 1927 until December 1, 1948.

4.

Plaintiff on July 12, 1948, applied to the Secretary of the Navy, requesting that he be transferred to the retired list of officers of the Navy and thereby be voluntarily retired, effective December 1, 1948. [135]

5.

Plaintiff's requested retirement was granted, and pursuant thereto, plaintiff was transferred to the retired list of officers of the Navy, effective December 1, 1948, plaintiff being given the rank of Rear Admiral, and plaintiff thereafter receiving the retired pay of the naval rank of Captain.

6.

Plaintiff has at all times and without interruption, been, from December 1, 1948, to the present time, and continues to be, a retired officer of the regular component of the United States Navy, with the rank of Rear Admiral, United States Navy, entitled to receive, and receiving, pay.

7.

Plaintiff, from prior to December 1, 1948 until the date of the filing of the Amended Complaint herein, was a resident of Coronado, San Diego County, California.

8.

On April 15, 1957, there were received, at Headquarters, Eleventh Naval District, San Diego, California, sworn charges, in the usual form prescribed under the Uniform Code of Military Justice, which charges alleged and specified that plaintiff did, on certain dates, which dates were after December 1, 1948, commit certain offenses in violation of that Code.

9.

On May 6 and 7, 1957, at San Diego, California, before a General Court-Martial convened by order of defendant Hartman, plaintiff, who was personally present thereat, was arraigned and tried upon said charges, the Court-Martial asserting its jurisdiction as under 10 U.S.C. 802(4). At the end of the trial plaintiff was found guilty of certain of said charges, and was thereupon sentenced by the Court-Martial to be dismissed from the service and to forfeit all pay and allowances. [136]

10.

On May 27, 1957, defendant Hartman, as the authority who convened the General Court-Martial, indorsed, in the record thereof, his approval, and forwarded the record to the Judge Advocate Gen-

eral of the Navy for review by a Board of Review.

11.

The Board of Review, on September 10, 1957, affirmed the Court-Martial findings and sentence; and the record was thereafter transmitted to the United States Court of Military Appeals for further review. The Court-Martial case is now before that Court, which has not yet made its decision.

12.

Plaintiff has not at any time been in custody, actual or constructive, nor in any manner restrained of his personal liberty by any arrest, restriction or other limitation; nor is he now or hereafter threatened with any.

13.

Plaintiff has not at any time been deprived of any pay or allowances, nor has he been deprived of any of the rights, privileges, benefits or emoluments of his office, rank or status; nor is he now or hereafter threatened with the loss of any of those, unless and until the findings and sentence of the Court-Martial are finally approved, and the sentence, or some portion thereof, is thereafter ordered into execution.

14.

Plaintiff was never recalled or ordered to active duty in the United States Navy, since his retirement on December 1, 1948 to the present time, including during or after the trial by Court-Martial.

15.

If the aforesaid Court-Martial sentence is approved and ordered executed, the plaintiff will be deprived of a sum in excess [137] of \$3,000, exclusive of interest and costs.

Conclusions of Law

1.

This suit prays for relief in connection with plaintiff's status and pay and allowances, to prevent the general Court-Martial proceedings from having any effect upon them, upon the ground that 10 U.S.C. 802(4) is unconstitutional, and that the Court-Martial was, therefore, without jurisdiction.

2.

The Second Cause of Action is, and the First Cause of Action is not, a civil action, wherein the matter in controversy exceeds the sum or value of \$3,000.00, exclusive of interest and costs, and arises under the Constitution and laws of the United States, under 28 USC 1331.

3.

As to the First Cause of Action, this Court has no power to issue writs of prohibition except in aid of its jurisdiction otherwise acquired.

In *Re Massachusetts* 197 U.S. 482; *Marshall v. Wyman*, 132 F. Supp. 169.

4.

The Court-Martial sentence against plaintiff not extending to confinement, or other personal re-

straint, the sentence cannot in any manner be increased in severity to include the same, in any future disposition or continuation of the Court-Martial case.

United States v. Stene, 7 USCMA 277; United States v. Kelley, 5 USCMA 259.

5.

This Court has no power to issue a Writ of Habeas Corpus, [138] or treat the Amended Complaint as a petition for same, where it appears plaintiff is neither under any form of custody or personal restraint, nor liable to be under same, in the circumstances.

Biron v. Collins, 145 F. 2d 759; See: Miley v. Lovett, 193 F. 2d 712; cf Boscola v. Bledsoe, 152 F. Supp. 343, aff'd 245 F. 2d 955.

6.

Under the Uniform Code of Military Justice, plaintiff being an officer of Flag rank, neither the Court-Martial sentence, nor any portion of it, can be executed, or ordered to be executed, until affirmed by the Board of Review, the Court of Military Appeals, and the President.

10 U.S.C. 866(b), 867(b)(1), 871(a); United States v. Grow, 3 USCMA 77; See Runkle v. United States, 122 U.S. 543.

7.

The Second Cause of Action being treated as other than a Petition for a Writ of Habeas Corpus,

the Secretary of the Navy is an indispensable party defendant as to so much of the Second Cause of Action as prays for injunction or any relief, other than for the convening of a District Court of Three Judges and a Declaratory Judgment that a statute of the United States, 10 U.S.C. 802(4), is unconstitutional.

Petrowski v. Nutt, 161 F. 2d 938, cert. den. 333 U.S. 842; *Schustack v. Herren*, 234 F. 2d 134; *Money v. Wallin*, 186 F. 2d 411.

8.

The Secretary of the Navy is not an indispensable party defendant, and defendant C. C. Hartman is a sufficient party defendant, as to so much of the Second Cause of Action as prays for the [139] convening of a District Court of Three Judges and for a Declaratory Judgment that a statute of the United States, 10 U.S.C. 802(4), is unconstitutional, and to such extent this Court has jurisdiction of this suit.

Shaughnessey v. Pedreiro, 349 U.S. 48, 53; *Williams v. Fanning*, 332 U.S. 490.

9.

Retired officers of the regular components of the Armed Forces of the United States, entitled to receive pay, are officers of the United States, and the pay is not a pension or annuity, but is an emolument of and dependent upon the office so held.

Badeau v. United States, 130 U.S. 439; *Allen v. United States*, 91 F. Supp. 933.

10.

Upon ceasing to hold the office, the right to pay, being an emolument thereof and dependent thereon, likewise ceases.

Allen v. United States, *supra*.

11.

To the extent that the Court-Martial proceedings against plaintiff involve the exercise of power or discretion by the President of the United States to terminate the holding of an office under the Executive Branch, including membership in the Armed Forces, a court has no power to interfere with such Presidential power, whether the same be exercised in the form of General Court-Martial proceedings or otherwise.

Myers v. United States, 272 U.S. 52; Schustack v. Herren, *supra*.

12.

To the extent that this suit seeks to prevent the [140] stoppage of, or compel the continuation of, the payment of plaintiff's retired pay, his remedy at law by suit against the United States is adequate and unexhausted, and upon this ground therefore, plaintiff is not entitled to any relief concerning the same.

Leeds v. Rossell, 101 F. Supp. 481.

13.

This suit not involving any restraint of plaintiff's personal liberty, and considering all of the

circumstances of the case, the nature of the issues and the character of the remedies available, it is appropriate, just and equitable that plaintiff be required to exhaust the military appellate remedies available to him, for direct review of his Court-Martial, as to all issues, and plaintiff not having done so, plaintiff should have no relief herein and judgment should therefore, upon this ground, be for defendant.

Cf. *Toth v. Quarles*, 350 U.S. 11; *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535; *Bevins v. Prindable*, 39 F. Supp. 708, aff'd, 314 U.S. 573; See: *United States v. Sutton*, 3 USCMA 220.

14.

Plaintiff was eligible for and was lawfully transferred to retired status as a member of a regular component of the Armed Forces entitled to receive pay.

34 U.S.C. 410b, 410n.

15.

Since August 3, 1861, there have been in effect at all times, without interruption, statutes which expressly subject to military law and trial by court-martial retired officers of the regular components of the Armed Forces of the United States who are entitled to receive pay. [141]

12 Stat. 290, 291; R.S. § 1457, 34 U.S.C. 389; 64 Stat. 108, 50 U.S.C. 552(4); 70A Stat. 36, 10 U.S.C. 802(4).

16.

Such statutes, including 10 U.S.C. 802(4), are constitutional both generally and as to plaintiff in particular, and the general court-martial proceedings against plaintiff are upon that ground not invalid, and plaintiff is not therefore entitled to any relief herein.

Closson v. United States ex rel Armes, 7 App. D.C. 460; *United States ex rel Pasela v. Fenno*, 167 F. 2d 593, cert. dism. 335 U.S. 806; See: Congressional Record, vol. 53, pages 12844, 12845.

17.

In this suit, seeking to enjoin application of an allegedly unconstitutional statute, District Court of three judges is not required to be convened to hear the matter, notwithstanding the allegations, unless a substantial issue of unconstitutionality is presented by such allegations.

Calif. Water Service Co. v. Redding, 304 U.S. 252; *Wicks v. Sou. Pac. Co.*, 231 F. 2d 130.

18.

The statute involved here, both generally, and as to plaintiff in particular, appears to be constitutional without doubt, to the extent that no substantial issue of its unconstitutionality is sufficiently presented as to require the convening of a District Court of three judges for the disposition of this suit; and upon that ground the application for the

convening of the District Court of three judges should be denied.

See cases cited, *supra*.

Let judgment be entered accordingly. [142]

Judgment

It is Hereby Ordered, Adjudged and Decreed:

1.

That the First Cause of Action herein be, and the same is, dismissed, for lack of jurisdiction in this Court.

2.

That as to the Second Cause of Action, plaintiff shall take no relief herein, and defendant shall have judgment and costs in the sum of \$20.00.

Dated: This 10th day of May, 1958.

/s/ JAMES M. CARTER,
United States District Judge.

Approved, As to Form Only. (Local Rule 7.)

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief, Civil Division,

JORDAN A. DREIFUS,
Assistant U. S. Attorney,

/s/ JORDAN A. DREIFUS,
Attorneys for Defendant.

ENRIGHT, VON KALINOWSKI
& LEVITT and

HILLYER & CRAKE,

/s/ By OSCAR F. IRWIN,

Attorneys for Plaintiff. [143]

Affidavit of Service by Mail Attached. [144]

[Endorsed]: Filed May 6, 1958. Entered May 8,
1958. Filed May 10, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Selden G. Hooper, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above entitled action on the 13th of May, 1958.

Dated: May 29, 1958.

HILLYER & CRAKE and

ENRIGHT, VON KALINOWSKI
& LEVITT,

/s/ By OSCAR F. IRWIN,

Attorneys for Appellant. [147]

[Endorsed]: Filed June 2, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The points upon which Appellant intends to rely on this appeal are as follows:

1. This court erred in dismissing plaintiff's first cause of action in plaintiff's complaint on the grounds the court lacked jurisdiction.

2. The court erred in determining that Article II (4) of the Uniform Code of Military Justice is constitutional.

3. The court erred in determining that a court-martial has jurisdiction under Article II (4) of the Uniform Code of Military Justice over a retired officer of a regular component of the Armed Forces drawing pay, when said retired officer has never been recalled to active duty at the time of said court-martial.

4. The court erred in failing to determine whether or not a retired officer of a regular component of the Armed Forces drawing pay is or is not a person within the Armed Forces, or the [150] land or naval forces of the United States as set out in the Constitution of the United States.

5. The court erred in determining that it was without jurisdiction to issue writs of prohibition under the first cause of action of the complaint.

6. The court erred in determining the Secretary of the Navy to be an indispensable party to defendant as to the second cause of action so far as it prayed for injunction or relief other than the con-

vening of the three-judge district court and a declaratory judgment.

7. The court erred in determining retired officers of the regular components of the Armed Forces of the United States entitled to receive pay are officers of the United States.

8. The court erred in determining that the pay of a retired officer of a regular component of the Armed Forces of the United States is not a pension or annuity, but that it is an emolument of and dependent upon the office so held.

9. The court erred in holding and concluding that a court is without power to interfere with presidential power in the form of the exercise of said power to a court-martial proceeding against the plaintiff and the court is concluding that such power may be exercised without jurisdiction or without due process of law as required in the Constitution and Statutes of the United States.

10. The court erred in determining that the plaintiff had not exhausted his remedies by law against the United States to compel the continuation of retirement pay.

11. The court erred in determining and concluding that it is just and equitable to require plaintiff to exhaust military appellate remedies for direct review of the court-martial as to all issues therein, inasmuch as plaintiff is not seeking review of the court-martial, but only a determination as to constitutionality [151] of a Statute pursuant to declaratory relief which provides that said remedy is

available regardless of the availability of any other remedies.

12. The Court erred in determining that a District Court of three judges was not required to hear the matter because a substantial issue of constitutionality was not presented by the complaint.

13. The court erred in denying the relief prayed in the complaint herein.

Dated: May 29, 1958.

HILLYER & CRAKE and
ENRIGHT, VON KALINOWSKI
& LEVITT,

/s/ By OSCAR F. IRWIN,
Attorneys for Appellant. [152]

[Endorsed]: Filed June 2, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 154, inclusive, containing the original:

Petition for Writ of Prohibition;

Points and Authorities for Writ of Prohibition;

Dismissal of Petition;

Amended Complaint for Writ of Prohibition;

Application for leave to file Supplement to Motion, etc.;

Memorandum in support of Motion to Dismiss and for Summary Judgment, etc.;

Motion by Plaintiff to substitute parties defendant;

Plaintiff's Memorandum in opposition to Defendants' Motion to Dismiss and for Summary Judgment;

Supplemental Memorandum, filed 10/4/57;

Second Supplemental Memorandum, filed 11/19/57;

Exhibit 6 (Supplement);

Stipulation and Order, filed 3/27/58;

Memorandum by Court;

Findings of Fact, Conclusions of Law and Judgment, filed 4/8/58;

Motion to Amend and Supplement Findings of Fact, and Conclusions of Law;

Affidavit and Order, filed 4/22/58;

Copy of Clerk's notice of entry of Findings of Fact, etc.;

Findings of Fact, Conclusions of Law and Judgment, entered 5/13/58;

Proof of Service by Mail, re Designation of Record on Appeal, etc.;

Notice of Appeal;

Designation of Record on Appeal;

Statement of Points on Appeal;

Counter Designation of Record on Appeal.

B. Minute Orders for 9/9/57, 1/10/58, 4/11/58 and 5/10/58.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Dated: June 17, 1958.

[Seal] JOHN A. CHILDRESS,
 Clerk,
/s/ By WM. A. WHITE,
 Deputy Clerk.

[Endorsed]: No. 16058. United States Court of Appeals for the Ninth Circuit. Selden G. Hooper, Appellant, vs. C. C. Hartman, Rear Admiral USN, Commandant, Eleventh Naval District, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed: June 18, 1958.

Docketed: June 24, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16058

SELDEN G. HOOPER, Appellant,

vs.

C. C. HARTMAN, Rear Admiral USN, Comman-
dant, Eleventh Naval District, Appellee.

STATEMENT OF POINTS ON APPEAL

The points upon which Appellant intends to rely
on this appeal are as follows:

1. Appellant hereby adopts the Statement of
Points on Appeal filed in the United States District
Court, Southern District, Southern Division for
California, commencing and appearing at Page 150
of the certified transcript of record in the above
entitled action.

Dated: July 1, 1958.

HILLYER & CRAKE,
/s/ By OSCAR F. IRWIN,
Attorneys for Appellant.

[Endorsed]: Filed July 3, 1958. Paul P. O'Brien,
Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO
BE PRINTED ON APPEAL

Comes now the Appellant, Selden G. Hooper, and designates the following portions of the record, proceedings and evidence to be contained in the record on appeal of the above entitled action:

1. Order of May 3, 1957, allowing the filing of Amended Complaint for Prohibition. (Page 11, transcript of record.)
2. Amended Complaint and/or Petition for Writ of Prohibition and for Declaratory Relief. (Page 12, transcript of record.)
3. Defendant's Motion to Dismiss and for Summary Judgment. (Page 30.)
4. Defendant's Notice of Motion to Dismiss and for Summary Judgment. (Page 29.)
5. Findings of Fact and Conclusions of Law filed May 13, 1958. (Page 134, transcript of record.)
6. Judgment entered May 13, 1958. (Page 134, transcript of record.)
7. Notice of Appeal filed June 2, 1958. (Page 147, transcript of record.)
8. Statement of Points on which Appellant intends to rely, filed June 2, 1958. (Page 150, transcript of record.)
9. Memorandum Opinion of the Court filed March 28, 1958, and Corrections of said Memorandum Opinion of April 11, 1958. (Page 110, transcript of record.)
10. This Designation.

11. Exhibit "A" attached to the original complaint and petition for writ of prohibition.

Dated: July 1, 1958.

HILLYER & CRAKE,
/s/ By OSCAR F. IRWIN,
Attorneys for Appellant.

[Endorsed]: Filed July 3, 1958. Paul P. O'Brien,
Clerk.

[Title of Court of Appeals and Cause.]

COUNTER DESIGNATION OF RECORD
TO BE PRINTED

In addition to the matter designated to be printed by appellant, appellee designates the following matter to be included in the printed record. The matters are indicated by their description and by the approximate page number in the Record on Appeal as nearly as could be estimated.

1. Affidavit of C. C. Hartman. (R. 32.33.)
2. Letter dated April 29, 1957, from Commandant, etc. (about R. 35).
3. General Court-Martial Order No. 90-57. (R. 36.) (2 sheets.)
4. Affidavit of James L. Holloway. (R. 62-65.)
5. From Exhibit 4 (R. 66) the following only:
Letter dated July 12, 1958, from Selden G. Hooper (att. 1);
Letter dated Dec. 8, 1948 from Sec. Navy (att. 4);

Indorsement in handwriting dated Dec. 13, 1948 (att. 5);

“Transcript of Naval Service” (att. 6).

6. From Exhibits 5, (R. 67) the following only: Letter dated Sept. 19, 1949 (att. 3).

7. From Exhibits 6A-D the following only: (R. 99-102):

Certificate of Herbert M. Jones;

Letter from Chief of Naval Personnel;

Certificate of Allen Winbeck;

Letter from C. A. Rigaud.

8. From Exhibit 6E (R. 104) the following only: Certificate of Eugene Moriarty.

9. Stipulation and Order filed May 27, 1958 (R. 108).

10. This Counter Designation.

Dated: This 3rd day of July, 1958.

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

/s/ JORDAN A. DREIFUS,
Assistant U. S. Attorney,
Attorney for Appellee.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 7, 1958. Paul P. O'Brien,
Clerk.